95-532

No. _____

Supreme Court, U.S.
FILED
JUN 27 1995
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

RUBEN ZUNO-ARCE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JACK R. LUELLEN
Counsel of Record for Petitioner
JAMES E. BLANCARTE
LAW OFFICES OF JAMES E. BLANCARTE

EDWARD M. MEDVENE
MITCHELL, SILBERBERG & KNUPP
1875 Century Park East, Suite 700
Los Angeles, CA 90067-2508
(310) 788-2760

68 pp

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

RUBEN ZUNO-ARCE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JACK R. LUELLEN
Counsel of Record for Petitioner
JAMES E. BLANCARTE
LAW OFFICES OF JAMES E. BLANCARTE

EDWARD M. MEDVENE
MITCHELL, SILBERBERG & KNUPP
1875 Century Park East, Suite 700
Los Angeles, CA 90067-2508
(310) 788-2760

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Ninth Circuit violated the holding announced by this Court in Kyles v. Whitley, - U.S. -, 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995), announced after the Ninth Circuit had issued its opinion, when it concluded that the government's improper withholding of exculpatory evidence from the defense did not constitute a Brady violation requiring the granting of a new trial.

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption of the case in the United States Supreme Court.

TABLE OF CONTENTS

		Page
I.	OPINIONS BELOW	1
II.	GROUNDS FOR JURISDICTION OF THE COURT	2
III.	CONSTITUTIONAL PROVISIONS AND STATUTES	3
IV.	STATEMENT OF THE CASE	4
	A. SUMMARY OF THE ARGUMENT . .	4
	B. PROCEDURAL HISTORY	6
V.	REASONS FOR ALLOWANCE OF THE WRIT	11
	A. THIS COURT'S OPINION IN KYLES DEMONSTRATES THE CIRCUIT COURT'S ERROR IN ITS APPLICATION OF THE BRADY RULE TO THE PARTICULAR FACTS AND ISSUES PRESENTED BY MR. ZUNO'S CASE	11
	1. The Circuit Court Improperly Required That Mr. Zuno Demonstrate That Disclosure Of The Suppressed Evidence Would Have Resulted In An Acquittal.	12

Page

2. The Circuit Court Improperly Applied A Sufficiency Of The Evidence Test To The Evidence Presented Against Mr. Zuno At Trial In The Absence Of The Suppressed Evidence. 15

3. The Circuit Court Improperly Engaged In A Harmless Error Analysis After Correctly Concluding That The Prosecution Had Improperly Withheld Material, Exculpatory Evidence From Mr. Zuno 17

4. The Circuit Court Improperly Engaged In An Item-By-Item Evaluation Of The Evidence To Determine The Materiality Of The Suppressed Evidence 19

B. THE KYLES OPINION CONFIRMS THAT THE PROSECUTION'S FAILURE TO TIMELY PRESENT EXCULPATORY EVIDENCE TO THE DEFENSE CREATED A REASONABLE PROBABILITY THAT ITS DISCLOSURE WOULD HAVE PRODUCED A DIFFERENT RESULT AT TRIAL AND CONFIRMS FURTHER THAT THE CIRCUIT COURT ERRED BY FAILING TO ORDER A NEW TRIAL. 22

VI. CONCLUSION 26

TABLE OF AUTHORITIES

CASES — PAGE

Brady v. Maryland,
373 U.S. 83, 83 S.Ct. 1194,
10 L.Ed.2d 213 (1963) . . . . . passim

Kyles v. Whitley,
- U.S. -, 115 S.Ct. 1555,
131 L. Ed. 2d 490 (1995) . . . . . passim

United States v. Bagley,
473 U.S. 667, 105 S.Ct. 3375,
87 L.Ed.2d 481 (1985)
. . . . . 11, 12, 14, 15, 17, 19, 20, 22

United States v. Agurs,
427 U.S. 97, 96 S.Ct. 2392,
49 L.Ed.2d 342 (1976) 12

United States v. Zuno-Arce,
44 F.3d 1420 (9th Cir. 1995) . . . . . passim

CODES — PAGE

Title 28, Section 1254 of the United States Code 2

United States Constitution, Amendment XIV, section 1 . 3

I.
OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is printed in Appendix "1" hereto and is reported at 44 F.3d 1420 (9th Cir. 1995).

II.

GROUNDS FOR JURISDICTION OF THE COURT

The judgment of the United States District Court for the Central District of California, which petitioner seeks to have reviewed, was entered on March 26, 1993, and is printed in Appendix "3" hereto.

The opinion of the United States Court of Appeals for the Ninth Circuit on review was rendered on January 11, 1995 and amended on February 13, 1995. Petitioner's request for rehearing with a suggestion for rehearing en banc was denied by the Ninth Circuit in an Order dated March 29, 1995, a copy of which is printed Appendix "2" hereto.

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254 of the United States Code.

III.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. **United States Constitution, Amendment XIV, section 1,** provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV.

STATEMENT OF THE CASE[1]

A. SUMMARY OF THE ARGUMENT

Defendant-Appellant Ruben Zuno-Arce ("Mr. Zuno") is a 63 year-old man, with no prior convictions, who has been sentenced to life imprisonment after his conviction in the United States District Court for the Central District of California (the "district court") of conspiracy in the kidnapping and murder of an agent from the United States Drug Enforcement Administration (the "DEA").

On appeal, the United States Court of Appeals for the Ninth Circuit (the "Circuit Court") found that the government had improperly withheld exculpatory evidence from Mr. Zuno, and his defense counsel, at trial.

---

[1] References in this Petition are made as follows: "CR" shall refer to the district court clerk's record; "CR P" shall refer to the district court clerk's record in the perjury case; "RT" shall refer to the reporter's transcript of proceedings; and "ER" shall refer to the Excerpts of Record lodged by petitioner in the Court of Appeals.

However, the Circuit Court concluded that Mr. Zuno was not entitled to a new trial because the withheld evidence was not material to the defense.

The Circuit Court's decision stands in direct conflict with this Court's opinion in Kyles v. Whitley, - U.S. -, 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995), decided only days after the Circuit Court rejected Mr. Zuno's Request for Reconsideration and Rehearing En Banc[2]. The Kyles opinion clarified the mandates of the rule announced in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 213 (1963) and demonstrates that the Circuit Court's affirmance of Mr. Zuno's conviction

---

[2] The timing of the Kyles opinion made it impossible for Mr. Zuno to present the Ninth Circuit with a memorandum detailing the impact of the Kyles opinion on the issues presented in Mr. Zuno's appeal. While Mr. Zuno respectfully asserts that the issues presented in this Petition warrant the granting of a Writ of Certiorari and a review on the merits by this Court, Mr. Zuno also respectfully suggests that the Court may desire to remand this case to the Ninth Circuit with instructions for that court to reconsider the case in light of the Kyles opinion.

resulted from a misapplication of the Brady rule because the Circuit Court improperly:

-- Required demonstration that disclosure of the withheld evidence would have resulted in an acquittal;

-- Applied a sufficiency of the evidence test to the evidence presented against Mr. Zuno at trial;

-- Engaged in a harmless error analysis after correctly concluding that the government improperly withheld exculpatory evidence from Mr. Zuno; and

-- Engaged in an item-by-item evaluation to determine the materiality of the withheld evidence.

B. PROCEDURAL HISTORY

In February 1985, DEA agent Enrique Camarena ("Camarena") was kidnapped and murdered by members of the Guadalajara Narcotics Cartel (the "Cartel").

In December 1989, Mr. Zuno was indicted on charges of conspiracy in Camarena's kidnapping and murder. (CR 742) Mr. Zuno was tried on those charges

in May 1990. The jury returned a verdict of guilty against Mr. Zuno but, on May 10, 1991, the district court ordered a new trial as a result of prosecutorial misconduct occurring during the prosecution's closing argument. (CR 1506). In March 1992, the United States Court of Appeals for the Ninth Circuit affirmed the new trial order. (CR 1615).

In December 1991, Mr. Zuno was retried on charges of conspiracy in connection with Camarena's kidnapping and murder. At trial, the two principal witnesses against Mr. Zuno were paid informants Jorge Godoy ("Godoy") and Rene Lopez Romero ("Lopez Romero"). On December 16, 1993, only moments before closing arguments were to commence, Mr. Zuno learned, for the first time, of a report detailing a September 1992 interview by the FBI of a confidential informant. The report revealed that the informant, "a former Mexican Federal Judicial Police officer who was involved in the investigation of the Camarena case in Mexico," (RT 1559-

1560; ER 32), including the questioning of a number of Mexican policeman and others directly involved in the Camarena murder investigation. The officer told the FBI that, on the basis of what he had been told during these interrogations, "DEA Agent Camarena was abducted because of his romantic relationship with Sara Cosio, a paramour of [drug lord] Rafael Caro-Quintero . . . ." Id.

Mr. Zuno immediately requested a mistrial, a continuance of the trial, an opportunity to re-open discovery relevant to the withheld reports, or, at a minimum, the right to argue the contradictory theory to the jury. The district court denied all of Mr. Zuno's requests but invited Mr. Zuno to "make any post-trial motions that you think are appropriate." (RT 1567-1570; ER 32).

Following the jury's verdict of guilty, the district court denied Mr. Zuno's motion for a new trial based upon the government's failure to make a timely production of the reports to Mr. Zuno's defense as required under

Brady. (CR 2016; ER 37). The district court also denied Mr. Zuno's Motion for Reconsideration, brought after Mr. Zuno's counsel was contacted by Militello Giovanni ("Mr. Giovanni"), who revealed that he had percipient knowledge regarding Camarena's activities for several hours immediately preceding Camarena's kidnapping. Mr. Giovanni's proffered testimony would have corroborated the alternative and exculpatory theory for Camarena's kidnapping contained in the withheld FBI report.

On review, the Circuit Court concluded that the withheld reports were exculpatory to Mr. Zuno and improperly had been withheld from Mr. Zuno and his counsel. 44 F.3d at 1426, 1427 but held that the government's conduct did not require a new trial for Mr. Zuno because the Circuit Court, usurping the jury's function, wrongly concluded that the jury's verdict would not have been different if the evidence had been disclosed to Mr. Zuno in a timely fashion. Id. at 1430. The Circuit Court's conclusion resulted from a misapplication of the

rule announced in the seminal case of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 213 (1963) and its progeny, as clarified by this Court in Kyles.

V.

REASONS FOR ALLOWANCE OF THE WRIT

A. THE KYLES OPINION DEMONSTRATES THE CIRCUIT COURT ERRED IN ITS APPLICATION OF THE BRADY RULE IN THIS CASE

"The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures. . . ." Kyles v. Whitley, - U.S. -, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995). The constitutional dimensions of that duty were delineated in Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 213 (1963) where it was held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

prosecution." Subsequently, in United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), this Court held that "regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" Kyles, 115 S.Ct. at 1565 (quoting Bagley, 473 U.S. at 682).

In Kyles, this Court clarified many aspects of the Bagley materiality standard which illuminate the constitutional errors committed by the Circuit Court and which mandate a new trial for Mr. Zuno.

1. The Circuit Court Improperly Required That Mr. Zuno Demonstrate That Disclosure Of The Suppressed Evidence Would Have Resulted In An Acquittal

In Kyles, this Court stated that the Bagley materiality standard does not require that the defendant

demonstrate that production of the withheld evidence would have resulted in the defendant's acquittal:

> "Although the constitutional duty [on the prosecution to produce evidence to the defense] is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that the disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based in the presence of reasonable doubt or acceptance of an explanation for the crime that does not implicate the defendant)."

Kyles, 115 S.Ct. at 1565-1566; see also Bagley, 473 U.S. at 680 (1985) (noting that in United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Court specifically "rejected a standard that would require the defendant to demonstrate that the disclosed evidence probably would have resulted in acquittal.").

The Circuit Court was inconsistent in its enunciation of the Bagley materiality standard and committed constitutional error by requiring that Mr. Zuno prove that timely disclosure of the withheld materials "would have changed the result of the proceeding." 44 F.3d at 1425 (quotation omitted). The Circuit Court compounded its error by quoting from the district court's denial of Mr. Zuno's Motion for a New Trial wherein the district court stated that "[t]he defendant is required to convince the Court under this ruling, that is under the state of the law, that the evidence withheld would have led to a different result at trial." Id. at 1428 (emphasis added). The Circuit Court contended that the district court's "analysis was careful and correct." Id. Kyles reveals that the district court's analysis in fact was both erroneous and prejudicial.

The Circuit Court erred further by relying on the district court's assertions that "[t]he defense had not used the reports to generate admissible evidence in the three

months between disclosure of the materials and the hearing on the motion for a new trial." Id. This assertion was not only factually incorrect, as evidenced by Mr. Zuno's proffer of Mr. Giovanni's testimony, but also improper because the district court never mandated that Mr. Zuno produce evidence to support the theory in the withheld reports before the hearing of the new trial motion and there is no authority for such a requirement.

In Kyles, this Court specifically rejected a similar proposition. The State of Louisiana argued in Kyles that the Court should "raise the threshold of materiality because the Bagley standard 'makes it difficult . . . to know' from the 'perspective [of the prosecutor at] trial . . . exactly what might become important later on.'" Id. at 1568 (quoting Tr. of Oral Arg. 33). Thus, the "State ask[ed] for a certain amount of leeway in making a judgment call as to the disclosure of any given piece of evidence." Id. (quotation omitted).

This Court rejected the State's argument by noting that "[t]o accommodate the State in this manner would, . . . , amount to a serious change of course from the Brady line of cases." Id. In fact, "[u]nless, indeed, the adversary system is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result." Id.

2. The Circuit Court Improperly Applied A Sufficiency Of The Evidence Test

Materiality under Bagley "is not a sufficiency of evidence test." 115 S.Ct. at 1566. Thus,

> "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an

> insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Id. (footnote omitted).

In fact, the Kyles opinion accepts that "not every item of the State's case would have been directly undercut if the Brady evidence had been disclosed." Id. at 1574. "But the question is not whether the State would have had a case to go to the jury if it had disclosed the evidence, but whether we can be confident that the jury's verdict would have been the same." Id. at 1575.

The Circuit Court improperly engaged in a sufficiency of the evidence examination. For example, the Circuit Court relied upon the tapes of Camarena's torture

and interrogation which do not mention Cosio and incorrectly concluded that, had the theory advanced in the withheld reports been accurate, "one would have suspected something about Cosio and Camarena's romantic involvement to be mentioned during the torture. It was not. Nor, if that were the motive, would it have made sense to obtain by excruciating torture two days of details affecting the business of the narcotics gang." 44 F.3d at 1430.

The Circuit Court's reliance upon the interrogation tapes stands in stark contradiction to the undisputed fact, accepted by the government throughout the history of this case, that at least one interrogation tape is missing, and the contents of that tape, or tapes, is completely unknown, while the available tapes stop and start sporadically. See 44 F.3d at 1429 ("The tape recorder appears to have been turned on when the torturers had Agent Camarena talking, . . . , and to have ben turned off while they were interrupting the talk to hurt him more."). The transcripts

of the interrogation tapes cannot be used to rule out any questioning of Camarena regarding Cosio or, for that matter, any other subject.[3]

If the withheld reports had been disclosed to Mr. Zuno in a timely fashion, the defense could have elicited testimony regarding the tapes, the missing tape or tapes and the incomplete record of the interrogation provided by the tapes. Mr. Zuno also would have been able to argue these issues to the jury.

Instead, the government's improper withholding of the reports from Mr. Zuno and his counsel deprived the jury of its only opportunity to hear and consider evidence

---

[3] The Circuit Court also ignored the fact that Mr. Zuno's name is not mentioned anywhere on the tapes, that there is no reference in the tapes to anything associated with Mr. Zuno and Mr. Zuno's voice does not appear on the tapes. It is inconsistent to assert, on the one hand, that the absence of Cosio's name from the tapes rules out her alleged relationship with Camarena as a precipitating factor in Camarena's kidnapping while, on the other hand, implying that the absence of any mention of Mr. Zuno on the tapes is not significant.

supporting a theory contradictory to the government's case against Mr. Zuno which was more plausible and internally consistent than the government's theory. The Circuit Court erred by assuming the jury, in the face of the incomplete interrogation tapes, would have ignored the contradictory theory.

3. The Circuit Court Improperly Engaged In A Harmless Error Analysis

"[O]nce a reviewing court applying Bagley has found constitutional error, there is no need for further harmless-error review." Kyles, 115 S.Ct. at 1566. The inapplicability of the harmless error inquiry is manifest because "a Bagley error could not be treated as harmless, since a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict." Id. (quotations and citations omitted).

The Circuit Court correctly found that the statement given to the FBI was exculpatory evidence which provided information that Camarena's torture and murder were motivated by Caro's jealous rage rather than money, a theory that "conflicted with the government theory." 44 F.3d at 1426. If provided with the statement, the "defense would have been able to argue, . . . , that the murder was revenge by Caro-Quintero against Camarena for developing a romance with Caro-Quintero's girlfriend, Sara Cosio. That motivation would have weakened the inference that Zuno-Arce had anything to do with it, even if he was part of the cartel." 44 F.3d at 1426. Thus, the Circuit Court "proceed[ed] on the basis that the . . . statement was exculpatory" and further "proceed[ed] on the basis that the exculpatory FBI report was improperly withheld [from the defense]." Id. (emphasis added).

After concluding that the prosecution had improperly withheld exculpatory evidence from the

defense, the Circuit Court erred by engaging in a harmless error analysis of the evidence:

> "Godoy and Lopez testified that the motive for the kidnapping was Camarena's knowledge of the cartel's activities. The tape recordings of Camarena's torture and interrogation corroborate their testimony. The torture transcript tended to prove that the reason for the kidnapping was the cartel's interest in knowing what information the DEA had. During the two days of torture recorded on tape, Camarena was not questioned about Sara Cosio, or told that he was being punished for his involvement with Cosio, even a single time. The district judge did not err in determining that '[t]he tapes establish the motive for the kidnapping and this testimony, whatever it might be, simply cannot impeach the verdict.'"

Id. at 1430 (emphasis added).

The Circuit Court's analysis was erroneous and resulted in the Circuit Court improperly minimizing the affect the government's improper withholding of exculpatory evidence had upon the preparation and presentation of Mr. Zuno's defense.

4. The Circuit Court Improperly Engaged In An Item-By-Item Evaluation Of The Materiality Of The Suppressed Evidence

A court must evaluate Bagley materiality "in terms of suppressed evidence considered collectively, not item-by-item." Kyles, 115 S.Ct. at 1567. Thus, while a court "evaluate[s] the tendency and force of the undisclosed evidence item by item [it should] evaluate its cumulative effect for purposes of materiality separately. . . . " Id. at n.10.

In Kyles, this Court noted that the Fifth Circuit's opinion "contain[ed] repeated references dismissing particular items of evidence as immaterial and so

suggesting that cumulative materiality was not the touchstone." Id.[4] Thus, this Court concluded that "[t]he result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by Bagley. . . ." Id.

Similarly, in the present case, the Circuit Court erred by conducting an item-by-item evaluation of the

---

[4] The Kyles Court focused on a number of specific statements in the Fifth Circuit's opinion which revealed a failure to consider cumulative materiality: 5 F.3d at 812 ("we do not agree that this statement made the transcript material and so mandated disclosure. . . . Beanie's statement . . . is itself not decisive."); id. at 814 ("the nondisclosure of this much of the transcript was insignificant"); id. at 815 ("Kyles has not shown on this basis that the three statements were material"); id. at 815 ("In light of the entire record . . . we cannot conclude that [police reports relating to discovery of the purse in the trash] would, in reasonable probability, have moved the jury to embrace the theory it otherwise discounted."); id. at 816 ("we are not persuaded that these notes [relating to discovery of the gun] were material"); id. at 816 ("we are not persuaded that [the printout of the license plate numbers] would, in reasonable probability, have included reasonable doubt where the jury did not find it . . . . the rebuttal of the photograph would have made no difference"). 115 S.Ct. at 1569.

evidence to support its conclusion that the suppressed evidence was not material. In deciding whether the prosecution's "late disclosure [of evidence] mattered," the Circuit Court own words revealed that its violation of the Kyles mandate by its failure to make "an assessment of the cumulative effect of the [withheld] evidence," 115 S.Ct. at 1569:

-- The Circuit Court continually claimed that there was significance in the fact that the interrogation tapes do not contain "a single reference during the two days of torture to Sara Cosio." 44 F.3d at 1429;

-- "Had the defense theory been correct that Camarena was killed because of a spur of the moment rage Caro-Quintero felt when he heard that Camarena was romancing Sara Cosio, one would have expected something in the about Sara Cosio and Camarena's involvement to be mentioned during the torture. It was not." Id. at 1430.

-- "Nor . . . would it have made sense to obtain by excruciating torture two days of details affecting the business of the narcotics gang." Id.

-- "The torture transcript tended to prove that the reason for the kidnapping was the cartel's interest in knowing what information the DEA had." Id.

-- "As for whether the defense could have produced testimony from people who were present during the torture [whose existence was revealed by the withheld reports], and would say that [Mr. Zuno] was not, the [district court] drew the pragmatic inference that it was extremely unlikely that such evidence could have been produced regardless of when the reports were disclosed." Id. at 1428-1429.

The Circuit Court impermissibly conducted an item-by-item evaluation of the evidence. In so doing, the Circuit Court ignored the fact that the jury had been prevented from making the same evaluations and judgments as a result of the government's improper withholding of exculpatory evidence from the defense. Kyles demonstrates that, in the guise of a Brady materiality analysis, the district court and the Circuit Court both improperly usurped the proper role of the jury.

B. IT IS REASONABLY PROBABLE THAT TIMELY DISCLOSURE OF THE EXCULPATORY EVIDENCE WOULD HAVE RESULTED IN A DIFFERENT RESULT AT TRIAL

In Kyles, this Court noted that a determination of Bagley materiality requires an analysis of the "suppressed evidence and its significance for the prosecution." 115 S.Ct. at 1575. A similar review in the present cases indicates that the evidence withheld from Mr. Zuno at trial was material to the defense and that the government's failure to timely produce it to the defense raises a reasonable probability that its disclosure would have produced a verdict favorable to Mr. Zuno at his trial.

Both the Circuit Court and the district court accepted that the alternate theory presented in the withheld FBI report was material because it contradicted the testimony of the government's two primary witnesses against Mr. Zuno:

". . . Godoy and Lopez both testified that the motivation for the torture and murder of Camarena was to end his interference with the narcotics business. Godoy said that Camarena's interference with the narcotic business was Zuno-Arce's stated reason for why Camarena should be kidnapped and murdered. In this context, evidence that the murder was motivated instead by Camarena's romance with Caro-Quintero's girlfriend would tend to be exculpatory."

44 F.3d at 1426.

The significant impact of the exculpatory evidence could have had, if timely disclosed by the government, on the preparation and presentation of Mr. Zuno's defense cannot be overstated. The theory advanced in the withheld reports that Camarena was kidnapped because of Caro's anger over Camarena's relationship with Cosio is directly inconsistent with the government's theory that Mr. Zuno was a participant in a series of conspiracy meetings with

Cartel members to plan the Camarena kidnapping as an act of retribution for the DEA's successful eradication efforts. The alternative theory in the withheld reports thereby undermines an essential element of the charges against Mr. Zuno.[5]

If the government had produced the reports to Mr. Zuno in a timely fashion, Mr. Zuno could have used the information contained in the reports to cross-examine, impeach and otherwise call into question the credibility and reliability of Godoy and Lopez-Romero's claims against Mr. Zuno.

Moreover, if timely produced, the defense could have used the withheld reports to argue that evidence that Caro acted in a spontaneous, irrational manner upon

---

[5] The federal charges against Mr. Zuno required the government to prove that Mr. Zuno "acted while Enrique Camarena-Salazar was engaged in, or on account of, the performance of official duties." Jury Instruction No. 37 (emphasis added).

learning of Cosio's relationship with Camarena was consistent with other actions taken by Cartel members, including their decision to attack and murder four Jehovah's Witness missionaries suspected of being DEA agents (RT 1070-1071; ER 27) and the murder of an American couple who accidently approached the home of a Cartel member (RT 1006, 1008; ER 27). In both of these cases, Cartel members acted spontaneously and ruthlessly to eradicate the perceived threat, in direct contrast to the government's theory that Cartel members engaged in a series of meetings to decide how to deal with the DEA agent allegedly causing the Cartel problems.

Furthermore, the evidentiary significance of the withheld reports was highlighted by the fact that, following the disclosure of the withheld reports a percipient witness, Mr. Giovanni, came forward with eyewitness testimony of a romantic relationship between Camarena and Cosio.[6]

---

[6] In an affidavit signed under penalty of perjury and (continued...)

In this context, it must be concluded that confidence in the jury's verdict cannot survive where the exculpatory evidence improperly withheld by the government would have entitled the jury to accept an alternative and exculpatory theory for the Camarena kidnapping and to question the reliability and credibility of the only two

---

[6](...continued)
presented to the district court Mr. Giovanni, a restaurant proprietor, declared that on the day Camarena was kidnapped, February 7, 1985, Camarena visited a restaurant managed and operated by Mr. Giovanni, El Sirocco, then located immediately adjacent to the American Consulate in Guadalajara, Jalisco, Mexico. (ER 37; Giovanni Decl. at ¶ 2). Camarena was accompanied by Cosio who Giovanni recognized "because she is the member of the Cosio-Viadurri family who are well known in Guadalajara." Id. at ¶ 5. Giovanni had previously seen Cosio with Caro. Id. During Camarena's February 7, 1985 visit, to the El Sirocco Restaurant. Giovanni frequently visited Camarena's table, where he observed Camarena and Cosio engaged in romantic hugging and kissing. Id. at ¶ 7. Later in the day, Camarena and Cosio left the El Sirocco Restaurant and "walked across the street and up the stairs into the El Camelot Restaurant." Id. at ¶ 12. Approximately 30 or 40 minutes later, there was a commotion outside the El Camelot Restaurant. Mr. Giovanni went outside to investigate and was informed by eyewitnesses that this commotion was the actual kidnapping of Camarena. Id. at ¶ 13.

witnesses to testify against Mr. Zuno.[7] This case thus parallels Kyles and mandates the conclusion that Mr. Zuno's trial was marred by the government's Brady violation.

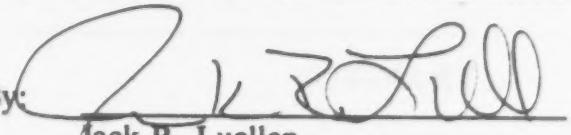
VI.

CONCLUSION

For each of the foregoing reasons, petitioner Ruben Zuno-Arce respectfully requests that this petition for a writ of certiorari be granted.

Dated: September 19, 1995

JACK R. LUELLEN
JAMES E. BLANCARTE
LAW OFFICES OF JAMES E. BLANCARTE

By: 
Jack R. Luellen
Counsel for Petitioner
Ruben Zuno-Arce

---

[7] Kyles recognized that the issue is "not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." 115 S.Ct. at 1575.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RUBEN ZUNO-ARCE, *Defendant-Appellant.*	No. 93-50311 D.C. No. CR-87-422-ER OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
March 9, 1994—Pasadena, California

Filed January 11, 1995

Before: J. Clifford Wallace, Jerome Farris and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld

SUMMARY

Criminal Law and Procedure/Defendants and Accused, Rights of/Discovery

The court of appeals affirmed a district court judgment of conviction. The court held that a district judge did not err in concluding that exculpatory evidence that the government withheld from the defense for a period of time would not have had a reasonable probability of changing the outcome of the defendant's trial.

Appellant Ruben Zuno-Arce was charged with conspiring to kidnap, torture, interrogate and murder of Drug Enforcement Agency (DEA) Agent Enrique Camarena-Salazar, and related crimes. The indictment stated that Zuno-Arce was part of an international narcotics cartel based in Guadalajara, Jalisco, Mexico.

Prior to trial, Zuno-Arce moved to take the depositions of witnesses in Mexico in order to get testimony that his previous sale of the house at which Camarena-Salazar was tortured was bona fide. The district court denied the motion.

In a DEA interview, a former agent of the Mexican Federal Judicial Police said he had interrogated a Mexican police commandante, who said that he had been present during the torture of Camarena-Salazar, and seven others were also present. Zuno-Arce's name was not among the people the commandante named. The Federal Bureau of Investigation (FBI) interviewed the same former Mexican police agent. The agent said that a number of people directly involved in the Camarena-Salazar murder investigation told him Camarena-Salazar was abducted because of his romantic relationship with Sara Cosio, a paramour of Rafael Caro-Quintero. The agent further stated that the persons he interrogated did not mention Zuno-Arce as being present during Camarena-Salazar's torture and interrogation.

According to the government's evidence at trial, Camarena-Salazar was successful in his duties as a DEA agent, and the cartel struck back violently. The evidence indicated that Camarena-Salazar was kidnapped, taken to a house owned by another of the cartel's members, Caro-Quintero, and interrogated and tortured for two days. The government's evidence indicated that the interrogation was directed at finding out what information Camarena-Salazar had about the cartel, and after getting the information, the criminals murdered Camarena-Salazar.

The main witness connecting Zuno-Arce to the conspiracy was a man named Cervantes. Zuno-Arce was convicted, but the district court granted him a new trial. In the second trial, the government did not use Cervantes. Its main witnesses were Godoy and Lopez. In each case, the government's evidence established that Zuno-Arce attended and spoke at several meetings at which the cartel planned the kidnapping and murder. Godoy and Lopez put the meetings at different times and places from Cervantes, with different people present. The government put on testimony by Godoy that meetings of the cartel members were held to discuss what to do about Camarena-Salazar and the DEA. The testimony indicated that Zuno-Arce attended, spoke and personally suggested that the criminals kidnap and kill Camarena-Salazar. There was also direct evidence that Zuno-Arce referred to the cartel as "us."

The government bolstered its case against Zuno-Arce by connecting him with the house at which Camarena-Salazar was tortured, suggesting that Zuno-Arce's prior sale of the house was a sham.

The prosecutors did not call defense counsel or give them a copy of the report on the FBI interview on the Thursday when they got it, or the next court day, or over the weekend. They filed a copy under seal with the court Monday morning. Once the materials were disclosed, defense counsel moved for a mistrial. The motion was denied.

Zuno-Arce was convicted. He moved for a new trial under *Brady v. Maryland*. The motion was denied. Zuno-Arce appealed his conviction, contending that the prosecutor knowingly put on false evidence, the Godoy and Lopez testimony. In regard to his convictions for Racketeer Influenced and Corrupt Organizations violations, Zuno-Arce also contended that the government presented no evidence from which a jury could infer that he was a member of the cartel, or that he acted with a purpose of maintaining his position in the cartel. Finally, Zuno-Arce also contended that the government hid

the exculpatory DEA and FBI interviews from him until after the evidence was closed.

[1] The district court did not abuse its discretion in denying a new trial based on the conflicting testimony of Godoy and Lopez. [2] In addition, Zuno-Arce presented no argument or evidence for his proposition that the prosecutor knowingly put on false evidence, except for the contradictions between Cervantes at the first trial and Godoy and Lopez at the second. This evidence did not conclusively prove that the prosecutor knew that the Lopez and Godoy testimony was false. [3] Discrepancies in the testimony about the details of the meetings during the two trials could as easily have flowed from errors in recollection as from lies. The inference from the discrepancies was too weak to vacate the district judge's exercise of discretion in denying a new trial. No sufficient showing of prosecutorial misconduct was made.

[4] From the evidence, a jury could reasonably infer that the cartel was a group and Zuno-Arce was a member.

[5] The district judge did not abuse his discretion in denying Zuno-Arce's pre-trial motion to take the depositions. None of the witnesses volunteered to testify at a deposition. All of the evidence was peripheral to the main issues.

[6] The district judge did not err in ruling that the DEA interview did not amount to exculpatory evidence, so could give rise to no *Brady* violation. The inference from naming others as present in the house, and not Zuno-Arce, was too weak in this case to amount to exculpatory evidence.

[7] The evidence from the FBI interview that the murder was motivated instead by Camarena-Salazar's romance with Caro-Quintero's girlfriend would tend to be exculpatory. [8] However, the defense could not have proved anything with a DEA agent saying that a third person had told him that others, under torture, had made statements which led the third person

to conclude that Camarena-Salazar's murder was for love, not money. The defense had not used the reports to generate admissible evidence in the intervening three months between disclosure of the materials and the hearing on the motion for a new trial. The defense had been given Cosio's name as a percipient witness much earlier. [9] The district judge correctly concluded that it would be extremely improbable that jurors, in the face of the details of the two-day interrogation and the other evidence presented that showed Zuno-Arce to be involved in the kidnapping and torture, would accept the theory that Camarena-Salazar was abducted and murdered as revenge for his involvement with Cosio. Had the defense theory been correct that Camarena-Salazar was killed because of a spur of the moment rage Caro-Quintero felt when he heard that Camarena-Salazar was romancing Cosio, one would have expected something about Cosio and Camarena-Salazar's romantic involvement to be mentioned during the torture; it was not. Nor, if that were the motive, would it have made sense to obtain by excruciating torture two days of details affecting the business of the narcotics gang.

COUNSEL

Edward M. Medvene, Mitchell, Silberberg & Knupp, Los Angeles, California, for the defendant-appellant.

John L. Carlton, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

OPINION

KLEINFELD, Circuit Judge:

Zuno-Arce was convicted of conspiring to kidnap, torture, interrogate and murder DEA Agent Enrique Camarena-

Salazar, and related crimes. His appeal raises numerous questions of criminal law, procedure and evidence.

According to the counts of the indictment for which Zuno-Arce was convicted, he was part of an international narcotics enterprise based in Guadalajara, Jalisco, Mexico. The indictment calls it the Guadalajara Narcotics Cartel. Enrique Camarena-Salazar, an agent of the United States Drug Enforcement Agency, was, according to the government's evidence at trial, tremendously successful during 1984-85 in the performance of his duties. Billions of dollars worth of marijuana were seized in a single raid at "El Bufalo," a ranch owned by another of the cartel's members, Rafael Caro-Quintero. The cartel struck back violently. Agent Camarena was kidnapped in February 1985, taken to Caro-Quintero's house at 881 Lope de Vega in Guadalajara, and interrogated and tortured for two days. The interrogation was directed at finding out what information Camarena had about the cartel. After getting the information, the criminals murdered Agent Camarena and buried him.

1. Prosecutorial Misconduct

Zuno-Arce claims that the prosecutor knowingly put on false evidence, so the indictment against Zuno-Arce must be dismissed with prejudice, or at the least, he must be given a new trial. Zuno-Arce did not raise the issue of prosecutorial misconduct below. He moved only for a new trial because the verdict was against the weight of the evidence. Although Zuno-Arce has not waived the issue of prosecutorial misconduct, we review it for plain error only. *United States v. Dischener*, 974 F.2d 1502, 1515 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1290 (1993).

Zuno-Arce was tried twice. He was convicted the first time, but the district court granted him a new trial because the prosecutor made an inappropriate reference in closing argument. In the first trial, the main witness connecting Zuno-Arce to

the conspiracy was a man named Cervantes. In the second trial, the government did not use Cervantes. Its main witnesses were Godoy and Lopez. In each case, the government's evidence established that Zuno-Arce attended and spoke at several meetings at which the cartel planned the kidnapping and murder. The issue arises from discrepancies about when and where the meetings occurred. With regard to these details, Godoy and Lopez put the meetings at different times and places from Cervantes, with different people present.

[1] The district court did not abuse its discretion in denying a new trial based on this conflicting testimony. If the jury believed Godoy and Lopez, the evidence sufficed to establish that Zuno-Arce attended and participated in the meetings as they said. As for whether they lied, or erred in their perceptions or recollections, the judge properly left these questions to the jury. *Swan v. Peterson*, 6 F.3d 1373, 1382 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 479 (1994). Zuno-Arce's attorneys cross-examined Godoy and Lopez thoroughly and well on the discrepancies in their recollections, and the recency of some of their recollections. The district court was not obligated to decide the credibility question and strike their testimony, because the determination of credibility is for the jury. *United States v. Candoli*, 870 F.2d 496, 506 (9th Cir. 1989).

[2] The prosecutorial misconduct claim presents a slightly different question. In some cases, a prosecutor might knowingly put on false evidence entitling a defendant to a new trial or dismissal. *Thomas v. Cardwell*, 626 F.2d 1375, 1381 (9th Cir. 1980), *cert. denied*, 449 U.S. 1089 (1981). In this case, though, Zuno-Arce presents no argument or evidence for his proposition that the prosecutor knowingly put on false evidence, except for the contradictions between Cervantes at the first trial and Godoy and Lopez at the second. This evidence does not conclusively prove that the prosecutor knew that the Lopez and Godoy testimony was false.

[3] Lawyers in criminal cases, for prosecution and defense, sometimes swim in a sea of lies, and must necessarily trust the jury to determine what is true, or whether reasonable doubt remains about what is true. Rarely will a retrial produce exactly the same evidence as the first trial, yet appellant's argument suggests invalidity of the verdict in the second trial whenever the testimony varies. Discrepancies in the testimony about the details of 1984 meetings during trials in 1990 and 1992 could as easily flow from errors in recollection as from lies. It is hard to see how the prosecutor could know who was at which meetings, or when and where they occurred, except for what people who said they were there told him. Zuno-Arce has offered no evidence whatsoever for prosecutorial misconduct except for the inference from discrepancies. That inference is too weak to vacate the district judge's exercise of discretion in denying a new trial. *A fortiori*, no sufficient showing of prosecutorial misconduct was made, since such actions will only lead to a new trial if "the prosecutor's conduct 'materially affected the fairness of the trial.' " *United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986) (quoting *United States v. McKoy*, 771 F.2d 1207, 1212 (9th Cir. 1985)). This is especially true when we review under our plain error standard of review, applicable because this was not raised below.

2. RICO Sufficiency

Two of Zuno-Arce's convictions are RICO violations. He argues that the government presented no evidence from which a jury could infer that he was a member of the cartel, or that he acted with a purpose of maintaining his position in the cartel. Here is the relevant statutory language:

> § 1959. Violent crimes in aid of racketeering activity
>
> (a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary

> value from an enterprise engaged in racketeering activity, or *for the purpose of* gaining entrance to or *maintaining or increasing position in an enterprise* engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished —

18 U.S.C. § 1959. (emphasis added). Zuno-Arce's argument is that several witnesses, including the DEA resident agent in charge of the Guadalajara office, had no knowledge that he was involved with any of the cartel activities. Zuno-Arce also points out that the person who ran a radio network for communications between cartel leaders Caro-Quintero and Ernesto Fonseca testified that, despite continual monitoring of radio traffic, he did not recognize Zuno-Arce's voice or hear his name.

The government put on testimony by Godoy that meetings of the cartel members were held to discuss what to do about Camarena and the DEA. Zuno-Arce attended, spoke, and personally suggested that the criminals kidnap and kill Agent Camarena:

> A: . . . And then Ruben Zuno-Arce said that if the D.E.A. agent didn't want to take anything or didn't want any deal then it was time to drop him.
>
> Q: Excuse me, Mr. Godoy. What did you understand that to mean?
>
> A: That would be to kidnap him and to kill him.

Zuno-Arce urged at another meeting as well that the criminals kidnap Agent Camarena:

> Q: Did you hear anything else?
>
> A: I heard Ruben Zuno say, "That [f___ing] gringo. What is he doing here in Mexico? It's not his [f___ing] country. We have to pick him up."

There was also direct evidence that Zuno-Arce referred to the cartel as "us."

> Q: What was it you heard?
>
> A: Rafael Caro-Quintero asked Enrique Alvarez del Castillo whether they already had all the information about the D.E.A. And Alvarez del Castillo answered, "I already have my people working."
>
> Caro-Quintero got angry. He got very angry and said, "Give me all the information about these people very soon so I can resolve this problem with these D.E.A. people."
>
> And the governor seemed to be affected and Rafael continued to pressure him, asking for all the data.
>
> And Mr. Zuno said, "Calm down, Rafael. Can't you see that the governor is already getting us all the information. This operation has to be done properly and calm, and it has to be properly planned so that everything works out properly."

[4] From this evidence, a jury could reasonably infer that the cartel was a group and Zuno-Arce was a member. Zuno-

Arce, they could infer, had sufficient standing in the criminal cartel to be able to speak sharply to one of its leaders and get him to react more reasonably. He tells the leader to "calm down," and says "the governor is already getting *us* all of the information."

Reviewing this evidence in a light most favorable to the prosecution, as we must, we find that a rational jury could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Bishop*, 959 F.2d 820, 829 (9th Cir. 1992). Zuno-Arce argues that certain witnesses' failure to mention him, and the radio operator's inability to specifically recognize Zuno-Arce's voice on the Caro-Quintero/Fonseca radio network, compel a verdict in his favor. But all his argument establishes is that rational jurors might have inferred his innocence from other testimony, and doubted or disbelieved the testimony about direct involvement. That does not establish insufficiency of evidence.

3. Depositions

Zuno-Arce had owned the house at 881 Lope de Vega for years. That is where Agent Camarena was held, interrogated and tortured. A couple of weeks before the kidnapping, Zuno-Arce had sold the house to someone else, who immediately sold it to another of the criminals in the group, Rafael Caro-Quintero. The government bolstered its case against Zuno-Arce by connecting him with the house, and suggesting that the sale was a sham. Three weeks before trial was scheduled, Zuno-Arce moved for leave to take depositions of four witnesses in Mexico, in order to get testimony that the sale was bona fide.

In criminal cases, depositions may be taken only in "exceptional circumstances." Fed. R. Crim. P. 15(a). The district judge denied leave in this case, because Zuno-Arce made an insufficient showing that the witnesses would be unavail-

able to testify at trial, that they would testify to something relevant at depositions in Mexico, and that there was sufficient justification for making such a motion so close to trial. He did not abuse his discretion in so ruling. *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1569 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990).

The district judge focused appropriately on unavailability, good faith effort to obtain the witnesses' presence at trial, *United States v. Sindona*, 636 F.2d 792, 803-04 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981), whether the movant had demonstrated that the expected testimony would be favorable, *United States v. Nichols*, 534 F.2d 202, 204 (9th Cir. 1976), and whether the deponents would be available for deposition and willing to testify. *Id.*

Zuno-Arce presented an attorney's affidavit that suggested what the substance of the deposition testimony would be. According to the attorney affidavit, one of the deponents, a Mexican real estate agent, would say that he and his brother had bought the house from Zuno-Arce in a legitimate, arm's length transaction, and their two nephews had sold it to Caro-Quintero. None of the four real estate people were willing to go the United States to testify, because of arrests and interrogations they had been subjected to since the Camarena kidnapping. According to the affidavit, the nephews "have since refused to discuss this matter with anyone," and none of the four "is willing to travel to the United States and testify on Mr. Zuno-Arce's behalf *or otherwise assist in his defense.*" (emphasis added). The affidavit even went so far as to say that the deponents "would not even be willing to meet with defense counsel."

Another witness, unrelated to the house sale issue, would have impeached Godoy on various details of where and whether certain meetings took place, but he too would not be willing to travel to the United States to testify about it.

[5] None of the witnesses volunteered to testify at a deposition. The house sale witnesses expressed a firm and unequivocal intention not to cooperate in any way. All this evidence was peripheral to the main issues. Godoy was heavily and independently impeached. It did not really matter much whether the sale of the house was a sham. The district judge had good reasons for deciding that this was not a case where "due to exceptional circumstances it is in the interest of justice," Fed. R. Crim. P. 15(a), to take the depositions, and did not abuse his discretion.

4. Brady

Zuno-Arce claims the government hid exculpatory DEA and FBI interviews from him until after the evidence was closed. He moved for a new trial under *Brady v. Maryland*, 373 U.S. 83 (1963), and when that motion was denied, moved for reconsideration.

To prove a *Brady* violation, a defendant must show that the government withheld material, exculpatory evidence. *Hendricks v. Zenon*, 993 F.2d 664, 673 (9th Cir. 1993). In order to be deemed material, "the evidence must have been that which if disclosed to the defense, would have changed the result of the proceeding." *Id.* We review a district court's denial of a new trial motion based on alleged *Brady* violations de novo. *United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993). We consider below whether the material was exculpatory, second, whether it was not produced when it should have been, and third, whether the failure timely to produce the exculpatory material mattered.

Both of the interviews at issue were of the same man, a former agent of the Mexican Federal Judicial Police, and both discussed the Camarena murder. In the DEA interview, in April 1991, the agent said he had interrogated a Mexican police commandante, who said that he had been present during the torture of Camarena, and "also present" were seven

other men and women. Zuno-Arce's name was not among the people the commandante named. The "indexing section" of the report does not list Zuno-Arce, and he is not mentioned anywhere in the report.

The FBI interviewed the same former Mexican police agent in September of 1992. In this second interview, the agent says that he rounded up and helped to torture a number of Mexican police and others directly involved in the Camarena murder investigation. The agent says that on the basis of what they told him during the torture and interrogation, "DEA agent Camarena was abducted because of his romantic relationship with Sara Cosio, a paramour of Rafael Caro-Quintero." The source also identifies a physician who "was present during the torture of Camarena and, in fact, assisted by keeping Camarena alive during the long interrogation." The agent told the FBI the names of people who his tortured prisoners said were at the Lope de Vega house on the night Camarena was murdered. Zuno-Arce was not mentioned as being present during the torture and interrogation of Agent Camarena. Zuno-Arce is not mentioned in the report at all.

[6] First, were the reports exculpatory? Zuno-Arce makes two arguments for why the reports were exculpatory. First, he says that naming others as present in the house, and not him, tends to show that he was not there. This inference is too weak in this case to amount to exculpatory evidence. The district judge correctly relied upon *United States v. Bryan*, 868 F.2d 1032, 1037 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989), in so holding. *Bryan* establishes that not every witness statement which fails to inculpate a defendant should be treated as exculpatory. *Id.* As the district judge said, the torture took place over two days, the statement does not show when the people who told the agents who was present were there themselves and when they were absent, and does not establish that Zuno-Arce was not there during the torture. Nor does the language of the witness statement suggest that the agent purported to list all persons who were present at any time during

the torture. The Godoy testimony, if believed, would suffice to convict, even if Zuno-Arce was never there. A person who helps plan and direct a murder does not need to be physically present when his plans are executed, to be criminally responsible. The district judge did not err in ruling that this 1991 DEA interview did not amount to exculpatory evidence, so could give rise to no *Brady* violation.

The district judge treated the second interview, the one taken by the FBI on September 9, 1992, as exculpatory. The statement says that Camarena's torture and murder was motivated by love instead of money. This conflicted with the government theory. The defense would have been able to argue, if it could produce evidence consistent with the statement, that the murder was revenge by Caro-Quintero against Camarena for developing a romance with Caro-Quintero's girlfriend, Sara Cosio. That motivation would have weakened the inference that Zuno-Arce had anything to do with it, even if he was part of the cartel.

[7] The exculpatory power of the evidence is not without doubt. Just as a person seeking to advance himself in a legitimate enterprise might do personal favors for his supervisor, so might a gangster kill an interloper on his supervisor's romantic relationship in order to advance himself in the gang. But in this case, Godoy and Lopez both testified that the motivation for the torture and murder of Camarena was to end his interference with the narcotics business. Godoy said that Camarena's interference with the narcotics business was Zuno-Arce's stated reason for why Camarena should be kidnapped and murdered. In this context, evidence that the murder was motivated instead by Camarena's romance with Caro-Quintero's girlfriend would tend to be exculpatory. We, like the district judge, proceed on the basis that the second statement was exculpatory.

The next issue is whether the report was turned over when it should have been. The prosecutors say that they got a phone

call from the Chief of the Narcotics and Dangerous Drugs Section of the Department of Justice during the noon recess Thursday, December 10. She told them that the Department "had recently learned of a potential *Brady* issue arising from an interview conducted by the FBI in Phoenix." That night the prosecutor got a fax of the report of the 1992 interview. A DEA agent's affidavit said that the FBI in Phoenix was not investigating the Camarena murder, and conducted the interview in connection with a different investigation.

The prosecutors did not call defense counsel or give them a copy of the exculpatory report Thursday night when they got it, or the next court day, Friday, or over the weekend. The prosecutors said they were busy working on oppositions to defense motions, so did not figure out what to do with the statements he had received Thursday night until the weekend. They filed a copy under seal with the court Monday morning at 8:00 a.m.

The judge was suspicious of the timing:

> Now I want to take up something that is very disturbing to me, and that is this statement that you submitted to the Court under seal on Monday morning, which in the view of the Court was clearly — contained exculpatory information with respect to Dr. Alvarez, and which was in the hands of the government since September 9th, 1992 . . .
>
> * * *
>
> It seems to me that any government agent knowing that that case was pending, and soon to go to trial, would realize that this was the type of information that should be provided to the defense counsel, yet it did not surface until the day the Court granted the judgment of acquittal [for Dr. Alvarez].

> So an ugly thought runs through the Court's mind, whether it would have surfaced at all had that not occurred.
>
> I want you to address some of these concerns that I have.

The judge is referring here to Zuno-Arce's codefendant, a doctor prosecuted for participating in the torture by keeping Camarena alive so that it and the interrogation could be extended. *The government prosecuted a different physician* from the one named in the statement given to the FBI on September 9, 1992. The government rested its case Thursday afternoon, and filed the statements under seal Monday morning, but did not give them to defense counsel. Later Monday morning, before the defense had seen the statements, the court granted the doctor's motion for judgment of acquittal. There is not much significance to saying that the prosecution filed the statement under seal within two working days of when the prosecutors received it. Two working days probably would not have mattered at all a month or two before trial, but they were absolutely critical when the government had just rested. At that precise time the defense had to decide whether to call witnesses and which ones, whether to have the defendant testify, and generally how to proceed. If the prosecution delayed turning over the exculpatory report until the defense could no longer make practical use of it, that is close, in practical effect, to not turning it over at all.

Even if the prosecutors were not hiding the statement until the defense could no longer make practical use of it, it is the government's, not just the prosecutor's, conduct which may give rise to a *Brady* violation. Prosecutors and investigators must often be tempted, in the service of what they see to be justice and protection of the public from crime, to increase the probability of success by depriving the defense of evidence which might tend, in their view, to confuse and mislead the jury. Exculpatory evidence cannot be kept out of the hands of

the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine *Brady* by allowing the investigating agency to prevent production by keeping a report out of the prosecutor's hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them.

It is true that the "prosecutor need not comb the files of every federal agency which might have documents," and that the disclosure obligation "should turn on the extent to which the prosecutor has knowledge of and access to the documents." *Bryan*, 868 F.2d at 1036. However, the prosecutor is "deemed to have knowledge of and access to anything in the custody or control of any federal agency participating in the same investigation of the defendant." *Id.* Possibly the documents would not have turned up in a search for documents relating to the "Zuno-Arce case," because Zuno-Arce is not mentioned in them. But if all agencies involved in the case were instructed to turn over witness interviews bearing on the "Camarena murder case," these reports would have been referenced. We, like the district court, proceed on the basis that the exculpatory FBI report was improperly withheld.

The third issue is whether the late disclosure mattered. Once the materials were disclosed, defense counsel moved for a mistrial. The district judge denied the motion for mistrial, but invited the defense to "make any post-trial motions that you think are appropriate." The seriousness of this invitation was plain, because after the last trial, the judge had granted the post-trial motion and ordered a new trial. Following the jury verdict, Zuno-Arce did move for a new trial. The question that remained, was whether or not the late-disclosed materials, if tendered to the defense sooner, would allow the district judge to say that there was a reasonable probability that, but for the nondisclosure, the result of the proceeding

would have been different. *United States v. Bagley*, 473 U.S. 667, 682-83 (1985).

Judge Rafeedie evaluated the evidence in exactly the manner which *Bagley* said was correct, and which we recently restated in *Hendricks v. Zenon*, 993 F.2d 664, 673 (9th Cir. 1993). He correctly evaluated it to see whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. *Hendricks* involved alibi evidence, which if believed, would have required acquittal, but was overwhelmingly demonstrated to be incorrect by other evidence, so that there was no reasonable probability that it would have changed the outcome. *Hendricks*, 993 F.2d at 674. Similarly, Judge Rafeedie concluded that there was no probability that the outcome would have been different if the DEA interview had been given to the defendant.

When ruling on the motion for a new trial, three months after the end of the case, he first noted as follows:

> Looking at the evidence provided to the defendant by the disclosure of documents ordered by the Court, the Court is unable to find that there is any such probability that the result would have been different.
>
> First, I have to note, that the Court's main impetus in providing the discovery at the time that it did was to enable the defendant to see based on that discovery whether or not they could during the two months that have passed, two and a half months since the defendant was convicted, whether indeed investigation of those factors set forth in those reports could produce some new evidence or some evidence that might have been available and is found at this time.

> I have to note that since that date nearly three months ago, the defendant has not come forward with any evidence, has not shown how this might have helped his case, in the form of statements or declaration or affidavits by parties which suggest that any of the persons named by the informants would exculpate the defendant Zuno in any manner.
>
> The defendant is required to convince the Court under this ruling, that is under the state of the law, that the evidence withheld would have led to a different result at the trial. Aside from mere speculation, the defendant has not done so.

[8] Judge Rafeedie's analysis was careful and correct. The defense could not have proved anything with a DEA agent saying that a third person had told him that others, under torture, had made statements which led the third person to conclude that Camarena's murder was for love, not money. *See United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989) (holding that the evidence was not admissible and would not have changed the defendant's presentation of the case), *cert. denied*, 494 U.S. 1008 (1990). The defense had not used the reports to generate admissible evidence in the intervening three months between disclosure of the materials and the hearing on the motion for a new trial. The defense had been given Sara Cosio's name as a percipient witness much earlier. The district judge noted that and concluded that "[i]n regard to Sarah Cosio and El Changa, the defendant had access to their names prior to this latest disclosure, because they were among the list of percipient and not testifying witnesses, . . . [s]o the failure to disclose, in the view of the court, did not have an adverse effect . . . ."

As for whether the defense could have produced testimony from people who were present during the torture, and would say that Zuno-Arce was not, the judge drew the pragmatic inference that it was extremely unlikely that such evidence

could have been produced regardless of when the reports were disclosed. He thought it unlikely that anyone would come to the United States and testify in court that "I was there the whole time Camarena was being tortured, and the whole time it was being planned, and Zuno-Arce was never there." Even if such a witness had been found, the testimony would have been merely cumulative to the impeachment of Lopez and Godoy.

The defense got another chance to show that the late disclosure mattered. It filed a motion for reconsideration, to which the defense attached an affidavit from the proprietor of a restaurant in Guadalajara. The restaurant proprietor said that on the day he was kidnapped, Agent Camarena ate lunch with Sara Cosio, another woman, and two men, got drunk, was "affectionate and romantic," to Sara Cosio and that the two were "sitting very close together, engaging in mutual hugging and kissing . . . ."

The district judge rejected the argument that this evidence would have had a reasonable probability of changing the outcome of the trial. The reason was the tape which the criminals made of the torture. The judge said:

> Even if you had a witness who could competently testify that the reason Camarena was abducted, in the face of that very graphic interrogation and torture tape that was available, it was very clear from that alone, together with other evidence that was presented at trial, that it is extremely unlikely that this evidence, even if presented by competent witness, would have undermined the confidence in the outcome and would necessitate or result in a different outcome.

We have carefully examined the transcript of the torture tape, as well as the restaurant proprietor's declaration, the DEA and FBI interviews, all the declarations filed in district

court relating to this issue, and the remainder of the record. The torture went on for two days. The tape recorder appears to have been turned on when the torturers had Agent Camarena talking, perhaps so that they could conveniently share the information with the rest of their criminal gang, and to have been turned off while they were interrupting the talk to hurt him more. There is not a single reference during the two days of torture to Sara Cosio. All the talk consisted of interrogation of Agent Camarena for the names, addresses, house descriptions, directions for finding houses, businesses, dates, amounts of money, information obtained, associates, who "put the finger on" whom, surveillance practices, telephone numbers, and so forth. Here is a representative sample from the middle of the interrogation ("C" refers to Camarena and "I" refers to the interrogator):

I: What name?

C: Well, that it was Barba . . . Javier Barba . . ?

I: Yes . . .

C: OK, and we knew he was working with Ernesto, and one of the things we check at the office every day is the newspaper, specifically the police section to see if a name comes out that we know . . .

I: And who passed you the information on Javier Barba . . ?

C: Lic. Garcia Bueno . . .

I: Who else . . ?

C: And . . . this Jesus Ramirez . . .

I: What did Jesus Ramirez tell you . . ?

C: Well, that he is one of the ones who is coming up . . . he told us this a week ago . . . two weeks ago, the last time we saw each other in the Tapatio.

I: When he talked to you did he speak of Samuel . . ?

C: No . . . Jesus Alvarez spoke to me of Samuel . . there are two Jesuses . . .

I: Two Jesus Alvarez's . . ?

C: No, no, no, there is one Je . . . two Jesuses . . . one Jesus Ramirez and one Jesus Alvarez . . .

I: Then this Samuel has a relationship with Lic. Barba . . . ?

C: I could not tell you . . . I do not know . . . I do not know this person . . .

I: Or relations with _____ person . . ?

C: I did not understand your question . . (background voices: no, yes, not me now, no, no, . . .)

I: Lic. Barba by you (unintelligible)

C: Look! The reason we were interested in this Samuel was because Jesus Alvarez was the one who told us that he was the one that had shot up Rogelio's car. . .

I: What more did he say . . ?

C: That he had an apartment over in Cangrejo . . .

I: Yes, you already told me that!

C: Yes, well, that is what I am telling you, sir . . .

I: And, and you . . . (recording cut)

C: We do not have . . . (recording cut)

I: You already told me what he has done . . .

C: Oh . . . bas . . . (exclamation)

I: (another interrogator): Well look . . . No, no. don't be stupid . . . what . . . who has . . ?

C: (speaking with difficulty) who goes around with (breathing hard) or who helps Ernesto Fonseca . . .

I: And what else . . ?

C: (again breathing hard and speaking with difficulty) that he is one of the ones who is rising at this time . . .

I: And what do you know about him . . . ? what has he done . . ?

[9] The district judge correctly concluded that it would be extremely improbable that jurors, in the face of the details of the two-day interrogation and the other evidence presented that showed Zuno-Arce to be involved in the kidnapping and torture, would accept the theory that Camarena was abducted and murdered as revenge for his involvement with Sara Cosio. Had the defense theory been correct that Camarena was killed because of a spur of the moment rage Caro-Quintero felt when he heard that Camarena was romancing Sara Cosio, one would have expected something about Sara Cosio and

Camarena's romantic involvement to be mentioned during the torture. It was not. Nor, if that were the motive, would it have made sense to obtain by excruciating torture two days of details affecting the business of the narcotics gang.

Godoy and Lopez testified that the motive for the kidnapping was Camarena's knowledge of the cartel's activities. The tape recordings of Camarena's torture and interrogation corroborated their testimony. The torture transcript tended to prove that the reason for the kidnapping was the cartel's interest in knowing what information the DEA had. During the two days of torture recorded on tape, Camarena was not questioned about Sara Cosio, or told that he was being punished for his involvement with Cosio, even a single time. The district judge did not err in determining that "[t]he tapes establish the motive for the kidnapping and this testimony, whatever it might be, simply cannot impeach the verdict." He correctly evaluated the evidence to see whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. There was not.

5. Macias-Barajas

In the first trial, a witness named Macias-Barajas testified that the government had put a great deal of pressure on him to testify against Zuno-Arce. He did not testify in the second trial. Zuno-Arce wanted to have the transcript of his testimony from the first trial read, so that the jury might infer that Godoy and Lopez testified the way they did because of government pressure. The judge denied the request, despite unavailability of Macias-Barajas, because it was irrelevant. We review a district court's decision regarding relevancy for abuse of discretion. *United States v. Daly*, 974 F.2d 1215, 1216-17 (9th Cir. 1992). The ruling was not an abuse of discretion. The inference that if Macias-Barajas was pressured, Godoy and Lopez must also have been pressured, is too weak to make the denial of the request an abuse of discretion.

AFFIRMED.

PRINTED FOR
ADMINISTRATIVE OFFICE—U.S. COURTS
BY BARCLAYS / ELECTROGRAPHIC—SAN FRANCISCO—(415) 588-1155

The summary, which does not constitute a part of the opinion of the court, is copyrighted
© 1995 by Barclays Law Publishers.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	No. 93-50311
	)	
Plaintiff-Appellee,	)	D.C. No. CR-87-
	)	422-ER
v.	)	
	)	ORDER
RUBEN ZUNO-ARCE,	)	
	)	
Defendant-Appellant.	)	

Before: WALLACE, FARRIS and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
Mar 29 1995
CATHY A. CATERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA vs.

Defendant's Name & Residence Address	Ruben Zuno-Arce Metropolitan Detention Center 535 N. Alameda Street Los Angeles, California 90012
Docket No.	CR-87-422(g)-ER;
Social Security No.	Unknown
Mailing Address	Criminal

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: Mar 24, 1993

COUNSEL

Without Counsel However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

X With Counsel Edward M. Medvene, Retained, James Blancarte, Retained, Mary Fulginiti, Retained

PLEA

X GUILTY, and the Court being satisfied that there is a factual basis for the plea

NOLO CONTENDERE NOT GUILTY

FINDING

There being a verdict of GUILTY, defendant has been convicted of the offense(s) of: 18 USC 1959(a)(5),2: Conspiracy to Commit Violent Crimes in Aid of Racketeering; Aiding and Abetting (Counts 3 of the 7th Superseding Indictment); 18 USC 1959(a)(1),2: Violent Crimes in Aid of Racketeering, Aiding and Abetting (Count 4 of the 7th Superseding indictment); 18 USC 1201(c): Conspiracy to Kidnap a Federal agent (Count 6 of the 7th superseding indictment); 18 USC 1201(a)(5), 2: Kidnapping a Federal Agent, Aiding and Abetting (count 7 of the 7th Superseding Indictment)

JUDGMENT AND PROB/COMMITMENT ORDER

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged an convicted and ordered that: Pursuant tot he sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be monitored for the term of:

On each of Courts 6, and 7 of the 7th Superseding Indictment, IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General of the Untied States or his authorized representative for imprisonment for a term of life and on each of Counts 3 and 4 a term of ten years. The defendant shall become eligible for parole under 18 USC 4205(a) upon serving one third of such terms. Said sentences on Counts 3, 4, 6, and 7 shall run concurrently with each other.

IT IS FURTHER ORDERED that the defendant shall pay a special assessment of $50.00 on each court, for a total of $200.00, to the United State, pursuant to 18 USC 3013(a).

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release, set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTIONS should the Bureau of Prisons designate defendant to a Community Corrections Center.

Signed by X U.S. District Judge s/Edward Rafeedie. U.S. Magistrate.

It is ordered that the clerk served a certified copy of this judgment and Probation/Commitment Order to the U.S. marshall or his representative.

Dated: Mar 26, 1993

By Judy Mathews
Deputy Clerk